93-713

Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GARY G. GRAHAM
Petitioner,

versus

THE SUPREME COURT OF FLORIDA, and THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO
THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

ISSUE ONE

WHETHER THE RESPONDENTS VIOLATED THE DUE PROCESS AND EQUAL PROTECTION REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS BY SELECTIVELY ENFORCING THE CODE OF JUDICIAL CONDUCT AGAINST PETITIONER FOR IMPERMISSIBLE REASONS.

ISSUE TWO

WHETHER THE RESPONDENTS VIOLATED THE FREEDOM OF SPEECH GUARANTEE OF THE FIRST AMENDMENT BY REMOVING THE PETITIONER FROM HIS OFFICE AS AN ELECTED JUDGE IN THE STATE OF FLORIDA FOR HAVING PUBLICLY CRITICIZED ATTORNEYS.

ISSUE THREE

WHETHER THE FLORIDA CODE OF JUDICIAL CONDUCT AS APPLIED VIOLATES THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT DUE TO VAGUENESS OF CONSTRUCTION.

ISSUE FOUR

WHETHER THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION VIOLATED THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS BY ACTING AS THE INVESTIGATOR, PROSECUTOR, JUDGE AND JURY.

ISSUE FIVE

WHETHER THE CONDUCT OF THE PROCEEDINGS IN THEIR TOTALITY RESULTED IN A FUNDAMENTALLY UNFAIR PROCEDURE THEREBY VIOLATING THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

PARTIES

The Petitioner is:

Gary G. Graham

The Respondents are:

The Supreme Court of Florida, and
The Florida Judicial Qualifications Commission

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW

The judgment sought to be reviewed issued on June 24, 1993 and was rendered in the Florida Supreme Court as follows:

Inquiry Concerning a Judge, No. 91-415

RE: Gary G. Graham

Document No. 80,273

The official report is *In Re Gary G. Graham*, 620 So. 2d 1273 (Fla. 1993).

The opinion is included in the Appendix at (A 2).

JURISDICTION

The judgment for which review is sought was filed and became effective on June 24, 1993. By motion to this Honorable Court the length of time for the filing of this petition was extended up to and including November 8, 1993.

The judgment for which review is sought is a final judgment of the highest court of the State of Florida where review could be sought and where the judgment turns upon substantial federal questions. (A 2) Jurisdiction of the United States Supreme Court is pursuant to 28 United States Code, Section 1257, paragraph (3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

FEDERAL CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of the law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

Section 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA CONSTITUTIONAL PROVISIONS

Article V, §12 (Reproduced in full at A 867.5).

FLORIDA CODE OF JUDICIAL CONDUCT

The applicable Canons of the Florida Code of Judicial Conduct are reproduced in full in the Appendix at (A 874.5).

FLORIDA JUDICIAL QUALIFICATION COMMISSION RULES

The Florida Judicial Qualification Commission Rules are reproduced in full in the Appendix at (A 762).

WISCONSIN STATUTES

The following Wisconsin Statutes which are relevant to issue four are reproduced in full in the Appendix at (A 878.5).

§ 448.02 (1)

§ 448.17

§ 448.18 (2)

§ 448.18 (7)

§ 15.405

§ 227.20

STATEMENT OF THE CASE

Petitioner was a twice elected County Court Judge who was and remained popular with the people (A 884, 898, 907). He was removed from office by the Florida Supreme Court (A 2) upon Findings of Fact, Conclusions of Law and Recommendation for Removal ("Findings") (A 19) made by a state constitutionally established investigatory and prosecutorial body, the Florida Judicial Qualifications Commission ("JQC") composed of 2 attorneys, 6 judges and 5 laypersons none of whom are selected by the Florida Supreme Court (A 868).

Petitioner, moved to Citrus County, Florida in 1983 (A 566). Perceiving serious problems with the legal system, he obtained the removal of Judge Leonard Damron for numerous acts involving improper politics and favoritism in the administration of the county court (A 567, 568). Damron, however, had been popular with local attorneys, politicians, and newspapers (A 568-569, 609-610).

Petitioner was elected in 1987. In 1991, the people of Citrus County overwhelmingly reelected him despite massive opposition from local attorneys, politicians, and newspapers (A 588).

Petitioner received a Notice of Investigation on April 28, 1992, inviting him to appear for a preliminary hearing on May 18,

to refute or explain 8 alleged acts of misconduct. A motion to continue the hearing was denied. At the hearing, the JQC reversed itself and granted a continuance, but only for the reason that it wanted time to file additional charges.

On June 29, Petitioner received an Amended Notice and a letter advising him that he would have only 3 hours to explain or refute 33 charges; thus allowing less than 6 minutes per charge.

On August 7, the JQC filed formal charges alleging 31 acts of misconduct, including allegations that Petitioner had stated in open Court, "You cannot separate morality from the law." On October 26, Petitioner was served with yet another 14 additional formal charges of misconduct, some dating back almost 5 years.

Prior to the close of pleadings, the JQC without consultation with Petitioner noticed the final hearing of 45 basically unrelated charges to begin January 26, 1993. Petitioner repeatedly sought but was denied continuances. (A 938, 962).

The Petitioner denied the charges and obtained several hundred witnesses to prove that he was consistently patient, courteous, and professional. On January 13, the JQC Special Counsel ("Prosecutor"), served a Motion in Limine asserting that unless the JQC limited the number of opinion witnesses to 3 and

character witnesses to 5, the proceedings would be unnecessarily delayed. Before Petitioner could respond, the motion was, without notice, granted.

On January 13, 1993, a Motion for Continuance asserting uncompleted discovery, transcriptions, and prosecutorial production (A 962) was summarily denied. Just prior to trial Petitioner received an order requiring him to detail every aspect of his case upon penalty of exclusion of unlisted witnesses or evidence.

To support selective enforcement, First Amendment, vagueness and due process affirmative defenses, Petitioner deposed numerous attorneys, judges, and politicians, and served them and others with trial subpoenas. The JQC obstructed the depositions by granting ex parte protective orders and refusing to compel the deponents to answer questions propounded to them (A 237-46, 836)

The trial began on January 26, 1993. At the close of the Prosecutor's case, 16 charges were dropped and a continuance was without explanation declared until February 23.

On February 10, Petitioner served a motion for continuance asserting that with adequate time he could establish proof of selective enforcement of the Code of Judicial Conduct (A 984). This motion was summarily denied. The prosecutor then filed a

Motion in Limine asserting the JQC had no jurisdiction to consider affirmative defenses based on the United States Constitution and requesting Petitioner be barred from presenting evidence in support thereof (A 917). The motion was granted.

The final phase of the hearing began on February 23. Over objection the JQC mandated and then forced the trial of these 19 separate factual allegations to conclusion in 4 days. (A 120, 716)

At trial approximately 470 of Petitioner's witnesses and 700 evidentiary items were excluded on the assertion that he was not permitted affirmative defenses based on the United States Constitution and that they were merely "cumulative" (A 924-927, 760)

During trial, Petitioner was hurried and pronounced in contempt for delay. The commissioners were impatient, inattentive, and distracted (see Issues 4 and 5, *infra*). Fifty-three days after the trial the JQC filed its "urgent" Findings (A 20, 26, 62). A motion filed by Petitioner requesting equal time was denied. He responded within 20 days as ordered.

Petitioner was removed by the Supreme Court of Florida on June 24, 1993, one justice dissenting on grounds relating to unequal imposition of sanctions. Contrary to usual procedure, the removal order was made effective immediately upon filing.

Petitioner first raised his due process federal questions at his preliminary hearing (A 349); thereafter he raised selective prosecution, free speech, and vagueness questions in his Second Amended Motion to Dismiss (A 331); supported by a memorandum of law (A 994). This motion was denied without a hearing. The federal questions raised by this motion were incorporated in the Petitioner's Show Cause Response (A 329).

Federal questions were raised in the Fourth Amended Motion to Dismiss (A 800) and its supporting memorandum (A 1063), which were ignored. The federal questions contained therein were incorporated in the Petitioner's Reply (A 336).

Federal questions were again raised in the Affirmative Defenses (A 1055) and were ruled unallowable (A 760).

The Petitioner raised numerous federal questions throughout the trial and the pre-trial conference (A 213-307, 308-323, 64-70). Petitioner's efforts to preserve the record were routinely obstructed by the Chair's refusal to allow proffers (A 125-172).

The Florida Supreme Court rejected Petitioner's due process arguments (A 9-10) and by ignoring his federal issues based on selective enforcement, free speech, and vagueness of the Code tacitly approved the JQC position that they were inapplicable.

ISSUE ONE

WHETHER THE RESPONDENTS VIOLATED THE DUE PROCESS AND EQUAL PROTECTION REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS BY SELECTIVELY ENFORCING THE CODE OF JUDICIAL CONDUCT AGAINST PETITIONER FOR IMPERMISSIBLE REASONS.

There were three state court trial judges presiding in Citrus County; Circuit Judges Thurman and Edwards and County Judge, Gary Graham, the Petitioner.

Judge Thurman routinely presided unshaven in a plaid shirt, no robe, and no tie. Without jurisdiction he released inmates from jail ex parte. In open court he referred to defendants as "sport" and on one occasion described a cocaine prosecution as a "chicken sh--" case. Judge Thurman was not disciplined for this conduct or expression. (A 592, 837-842).

In a mediation proceeding Judge Edwards told a litigant sued by a famous baseball star that "there'll always be people like you around, but lets face it there's only one Ted Williams." He sentenced the litigant's out of town attorney to six months in jail for objecting by motion to this statement. The sentence was reversed on appeal. He openly drove a pick-up truck bearing a license tag which stated "I'm a Coon A__" graphically depicting a

raccoon, tailed raised, exposing a brown anus and black sphincter. Judge Edwards was not disciplined for this conduct or expression. (A 836-842)

During the depositions of former Florida Chief Justice Ehrlich, former Circuit Judge Coe, and Chief Circuit Judge Swigert, hypotheticals tracking the described conduct of Edwards and Thurman were presented for their consideration. (A 838)

The hypotheticals used fictitious names. The conduct was deemed unethical and in one instance described as proof the judge was unfit and his actions near criminal. (A 839)[1]

Petitioner's asserted wrongful conduct included refusing a probationer child visitation because visitation allowed during his first period of probation directly contributed to a probation violation. He threatened a sheriff's deputy with contempt for repeated life threatening conduct which violated the sheriff's written rules, used the word "penis" in a case involving a defendant spray painting a penis on a school wall,[2] and criticizing local

---

[1]If the full record is brought forward for review it will reveal the misconduct of three additional judges which remains well known but undisciplined by the JQC.

[2]See Issue Three *infra* for further details.

attorneys and judges as well as the justice system. (A 4, 15)

For this conduct the JQC recommended the ultimate sanction of removal from elected public office. (A 60) The Florida Supreme Court approved this recommendation and removed the Petitioner with one justice dissenting to the removal as an unequal application of the law. (A 2)[3]

Petitioner was obstructed from discovering and proving the impermissible motive of silencing his criticism. The JQC quashed discovery subpoenas, refused to compel Judge Edwards to answer deposition questions and ruled that it would not consider the affirmative defense of selective prosecution for the exercise of protected expression. (A 237-246, 836, 759) The Florida Supreme Court approved the JQC view that the equal protection clause was inapplicable. (A 2) Despite the discovery obstructions, the record compels a strong inference of selective enforcement.

The Opinion of the Florida Supreme Court is in conflict with *Gentile v. State Bar of Nevada*, 501 U.S ____, 115 L.Ed.2d 888, 111 S.Ct. 2720 (1991), *Scott v. Flowers*, 910 F.2d 201 (5th Cir.

[3]In dissent Justice MacDonald pointed out several examples of similar or more egregious conduct sanctioned by reprimand instead of removal.

1990), and *Baumgartner v. United States*, 322 US 665 (1944), on important Fifth and Fourteenth Amendment issues.

By strong inference the strikingly similar case of *Scott, supra*, influenced the prosecutorial procedures employed by the JQC. Unless circumvented, it presented an obvious constitutional bar to Petitioner's removal. It is only when considered in that light that the unusual procedures employed have a rational explanation.

Scott, like Petitioner, was an elected state court judge on the lower level of the trial court structure. He, like Petitioner, had publicly criticized higher court judges and the local justice system; and was sanctioned. The sanction was overturned on First Amendment grounds by the Fifth Circuit.

In *Gentile, supra*, an attorney was disciplined for making certain statements to the press concerning defenses he intended to raise at the criminal trial of a defendant he was representing. The statements were intended to counter statements to the press by the prosecution and police extolling the strength of their case.

This Court reversed (in Part III) the sanction, Opinion by Kennedy, J., joined by Marshall, Blackmun, Stevens and O'Connor, J.J., holding that the rule under which the sanction was imposed

was void as applied for vagueness.

In the opinion in Part III, it was stated:

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, Kolender v. Lawson, 461 US 352, 357-358, 361, 75 L Ed 2d 903, 103 S Ct 1855 (1983); Smith v. Goguen, 415 US 566, 572-573, 39 L Ed 2d 605, 94 S Ct. 1242 (1974), for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility. The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government. [Emphasis added.]

The Respondents in removing Petitioner departed from and approved a departure from the usual and customary course of judicial proceedings as announced in *Scott*, *Gentile*, and *Baumgartner*, *supra*. Review by this Court is appropriate.

ISSUE TWO

WHETHER THE RESPONDENTS VIOLATED THE FREEDOM OF SPEECH GUARANTEE OF THE FIRST AMENDMENT BY REMOVING THE PETITIONER FROM HIS OFFICE AS AN ELECTED JUDGE IN THE STATE OF FLORIDA FOR HAVING PUBLICLY CRITICIZED ATTORNEYS.

The exact reported words of the Petitioner made in response to questions posed to him by a newspaper reporter were that:

> . . . he believes it shows disrespect to the court if attorneys are not on time, bicker amongst themselves, act "goofy," and "don't talk like attorneys," or "dress like attorneys."
>
> "And I'm going to start taking actions against attorneys who do not act right," Graham said.
>
> He said he will caution them the first time they do it; then on second offenses take away their privilege to have him call their cases out of the docket's order for their convenience; then on third occurrence hold them in contempt of court, fining them, on the fourth time hand them community control; and the fifth time put them in jail.
>
> "Maybe when they're over there they can read some law books and learn how to act in court," he said. (A 936)

The Petitioner was then quoted as saying:

> "There are many fine attorneys in the Citrus County Bar Association who do a fine job, act right, and get good results for their clients." (A 936)

Based on these statements the JQC made the following well edited findings of fact which omitted the above stated words of praise and the context of a jail sentence for a <u>fifth</u> act of contempt:

(A.) "The Commission finds that on or about September 15, 1988, in an interview with a reporter from a local Citrus County newspaper, Respondent made a number of disparaging and insulting remarks about Citrus County attorneys, including statements that local attorneys were not on time, bickered among themselves, acted goofy, did not talk like attorneys, or dress like attorneys and that he should put them in jail where they can read law books and learn how to act in court. Respondent's statements were widely reported in the local print media and many attorneys were offended by the remarks. The local bar association issued a public statement critical of Respondent's remarks following an unsatisfactory meeting with Respondent which was mediated by the county's Administrative Judge. Respondent ultimately issued a statement in the nature of apology for his remarks. Respondent's remarks were made without reasonable factual basis, were unnecessary for the proper fulfillment of his judicial duties and could reasonably tend to lessen the public confidence in the integrity and impartially of the judiciary." (A 28) [Emphasis added.]

The Florida standard for removal of judges is willful or persistent failure to perform duties or other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office (A 872). This must be proven by clear and convincing evidence (A 7). The Florida Supreme Court has interpreted this to mean that if conduct does not in fact cause lack of public confidence in the judiciary a judge should nevertheless be removed if his conduct "should" erode public confidence (A 12). This interpretation alone injects an impermissible element of vagueness

as applied to the suppression of free speech.

However, the JQC further expands the vagueness of the Code by its findings that Petitioner's speech "could" reasonably "tend" to lessen public confidence. "Could" implies a possibility; "tend" implies a leaning toward a result. Thus the Petitioner was removed for speech which had a possibility of leaning toward lessening the public confidence in the judiciary; a far cry from conduct which "should" or indeed did have such effect.

The vote, as related to this finding, is a nullity because it is analogous to a criminal jury returning a verdict that "beyond a reasonable doubt" the evidence tends to show that the defendant might possibly have premeditatedly killed the victim. These modifying terms made meaningless the required clear and convincing standard of proof.

This Court has held that a finding of fact, to be acceptable, must be supported by evidence meeting the burden of proof and properly reflecting the charge. See *Baumgartner v. United States*, 322 US 665 (1944) dealing at length with findings of facts as related to the evidence and the charge.

"Public comments by judges about pending cases and social issues have caused a firestorm of debate within the Bar and

throughout society for at least two decades, . . ." Abbie G. Baynes, *Judicial Speech: A First Amendment Analysis*, 6 Georgetown Journal of Legal Ethics 81 at 81 (Summer 1992). The author cites as examples the controversies surrounding public statements made by the Chief Judge of the Fourth Judicial Circuit of Florida, three United States District Judges, and a United States Supreme Court Justice.

While the state has a duty to regulate the conduct of the judiciary, the state's efforts must be subjected to an increasingly strict level of scrutiny as they move closer to impairing our core First Amendment values. *Morial v. Judiciary Commission*, 565 F.2d 295, 300 (5th Cir. 1977). Where a regulation goes so far as to restrict speech because of its content, a court must strictly scrutinize such a regulation, requiring the state to bear the burden of showing that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Windmar v. Vincent*, 454 US 263, 270 (1981)

The Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment Values," and is entitled to special protection. *Connick v. Myers*, 461 US 138, 145, (1983). Public issue speech has been

described as a "core" First Amendment value. *Scott v. Flowers*, 910 F.2d 201, 212 (5th Cir. 1990)[4]

The Petitioner was removed from office for the content of speech regarding the public issue of attorney misconduct. The truth of his statements were never contested. (A 627-629)

The removal of an elected public official runs against our fundamental democratic ideals and has been described as ". . . a matter of gravest possible concern." *Judicial Inquiry and Review Board v. Snyder*, 523 A 2d 294, 300 (Pa. 1987) The removal of the Petitioner for the content of his truthful speech regarding a public issue has occurred during a "firestorm of debate within the Bar and throughout society" about the propriety of judicial speech. (*Baynes, supra*) The question involves core values of the First Amendment and the ideals of democracy and is a special and important issue of national importance which justifies resolution by this Honorable Court.

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[4]The Opinion of The Supreme Court of Florida in this case which adopted and approved the JQC Findings is on its face in direct conflict with *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990).

In *Scott* a justice of the peace was publicly reprimanded for criticizing other judges. As in this case, the truth of his statements were never at issue. *Id* at 204 Also consistent with this case his sanctions were bolstered by allegations of insensitivity to litigants. *Id* at 204. The District Court in *Scott* declared the sanctions imposed against Judge Scott to be a violation of the First Amendment.

ISSUE THREE

WHETHER THE FLORIDA CODE OF JUDICIAL CONDUCT AS APPLIED VIOLATES THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT DUE TO VAGUENESS OF CONSTRUCTION.

In 1992, Petitioner presided over a weekend first appearances in a courthouse empty except for the judge, bailiff, and criminal defendants. Observing a lone bailiff and numerous defendants, concerned for the safety of the bailiff and consistent with written security practices, he instructed the bailiff to have at least two officers present whenever there was more than one defendant. Upon a reoccurrence, Petitioner threatened the bailiff's supervisor with contempt if the situation continued. (A 1109, 1121)

In another case he sentenced a defendant to probation for battery of his estranged spouse and trespass to an occupied building. His children were named victims in the trespass charge. Authority exists to prohibit contact with victim family members. *Rodriguez v. State*, 378 So.2d 7, 10 (Fla. 2 DCA 1979); *Jano v. State*, 559 So. 2d 1270, 1272 (Fla. 4 DCA 1990). Accordingly the Petitioner prohibited contact with the wife but nevertheless allowed defendant visitation with his children. As a result of the child visitation defendant violated his probation.

Petitioner placed defendant back on probation with the further condition that he not have contact with his wife or children until he completed probation. Overlooking the fact that the children were named victims and visitation had caused the probation violation, the Appellate Division reversed Petitioner and ruled the condition was an unreasonable condition of probation. (A 1070, 1087)

In another case Petitioner sentenced a 19 year old with a history of burglary to 6 months in jail for painting a giant penis on school walls. His mother stated that everyone does this on graduation night. Petitioner asked the audience to stand if they had graduated from high school and to be seated if they had painted a giant penis on school walls on graduation night. When no one sat down he told the defendant's mother that she was the defendant's problem and that, even in today's society, painting giant penises on school walls was not an accepted rite of passage.[5] (A 1132)

For decisions such as these Petitioner was found guilty of violating the Code of Judicial Conduct ("Code") and the Florida Supreme Court removed him from his twice elected public office.

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[5]The JQC characterized the Petitioner's use of the word "penis" as the use of " . . . vulgar, inappropriate and highly offensive language." (A 42-43) The Florida Supreme Court in its opinion stated that the Petitioner used ". . . vulgar and offensive language." (A 5-6) Neither the court nor the JQC offered suggestions as to what word should be used in a case such as this.

Petitioner was also removed for stating that some attorneys acted goofy and that on a fifth conviction for contempt he would consider putting them in jail. (See Issue 2, *supra*)

Petitioner raised the affirmative defense that the Code was unconstitutionally vague. (A 1055) The JQC drew issue with a denial. (A 757) Thereupon, the Petitioner deposed a county judge, a circuit judge and a former Florida Supreme Court justice. The deponents were tested to determine whether hypothetical circumstances were proscribed by the Code. Accuracy was measured against written opinions issued by the Committee on Standards of Conduct Governing Judges, a state created committee of experts ("Conduct Committee"). The judges repeatedly gave answers inconsistent with the Conduct Committee. (A 361-72, 375-80, 383-85, 389-90, 393-94, 400-403, 410-13)

They were also presented hypotheticals identical to the Petitioner's alleged conduct. Frequently the judges didn't know if the conduct was prohibited or believed it was permitted by the Code. (A 373-75, 387-89, 391-92, 398-400, 404-05, 414-17)

One judge testified that the Conduct Committee could not provide definite answers to what the Code meant and that he would err on the side of caution and not engage in certain conduct even

if it involved the right to free speech. (A 368-71)

Ben Overton, now a Florida Supreme Court Justice, once analyzed what should not be grounds for judicial discipline:

> . . . In the absence of fraud or a corrupt motive, a commission must avoid taking action against a judge for reaching an erroneous legal conclusion or misapplying the law. * * * It was to this point that Chief Justice Burger spoke in *Chandler v. Judicial Council* when he stated: "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of the judges in deciding cases or in any phase of the decisional function." To allow disciplinary proceedings to evaluate judicial decisions could force judges to walk in ill-defined and standardless line between propriety and impropriety. Clearly, such a sword over a judge's head would have a tendency to chill his independence. A judge would have to be as concerned with what is proper in the eyes of the disciplinary commission as with what is the just decision. [Ben F. Overton, "Grounds for Judicial Discipline," 54 *Chicago-Kent Law Review* 59, 65 (1977).]

There is nothing in the record indicating Petitioner was guilty of fraud or corrupt motives in the judgments leading to his ouster. In its opinion removing him the Florida Supreme Court stated that:

> His zealous pursuit of a pure society apparently clouded his ability to impartially adjudicate the matters before him. His motives are acceptable, but his methods are not. * * * We recognize that Graham is not dishonest, venal, or guilty of moral turpitude. (A 8)
>
> * * *
>
> No one claims, or even suggests, that Judge Graham is dishonest. The record supports the claim that he in fact is genuinely honest. (A 16)[Emphasis added.]

Where a Code is applied so that a twice elected judge is removed from office for truthful, if disturbing, public statements and honest, if mistaken, courtroom judgments, a massive invasion of the independence and integrity of the judiciary results.

At least 37 states have a combination of an almost identical code and related enforcement procedure. (A 776) In states throughout the nation disciplinary commissions have interpreted the Code or similar codes in equally overreaching and disturbing ways, including a charge rejected by the Montana Supreme Court against a state supreme court justice for having stated in dissent that the majority opinion was "intellectually dishonest" *State v. Judicial Standards Comm.*, 643 P.2d 210 (Mont. 1982). Other examples will be given if this petition is granted.

The Code as applied chills the exercise of public speech and official judgment and diminishes the judiciary. Unless this Court places a narrowing interpretation on the Code, judges throughout the nation will continue to be held up to public censure for the exercise of their judgment and their First Amendment right to speak. Accordingly, this question presents a special and important issue of national importance which justifies a resolution by this Court.

ISSUE FOUR

WHETHER THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION VIOLATED THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS BY ACTING AS THE INVESTIGATOR, PROSECUTOR, JUDGE AND JURY.

Where the investigative and adjudicative functions of an administrative hearing panel are combined, it is not an unconstitutional violation of procedural due process unless under a **realistic appraisal**, bestowing investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden. *Withrow v. Larkin*, 421 US 35, 47 (1975).

Larkin complained it was fundamentally unfair for his prosecutors to also try him. This Court said the combination of investigative and adjudicative functions **without more** does not constitute a due process violation (*Id.* at 58), but said: "Of course, we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice" (*Id.* at 54).

Theoretically, there are major legal, political, and practical distinctions between the *Withrow* medical board and the JQC. (The full Wisconsin procedure is set forth in detail at A 878.5.)

Before Dr. Larkin's license could be removed, he had the

right to a jury trial. No such right is afforded judges in their removal proceedings. The removal of doctors from their profession does not involve highly charged political forces. Members of the Wisconsin medical board are not elected officials needing the support of newspapers and attorneys to retain their elected offices. Of the 13 members on the JQC, 6 are elected officials subject to newspaper pressure. The 4 trial judges may only be challenged for office by attorneys and the 2 appellate judges rely on contributions and endorsements from attorneys to aid in their retention elections.

Petitioner, among other things, was charged with criticizing attorneys, judges, politicians, and favoritism to influential people by his predecessor. The propriety of his criticism was then judged by a group of attorneys, judges, politicians, and influential appointees after newspaper editorials criticizing him for his tough sentences and calling for his removal were sent to them. (A 657) Under a "realistic appraisal" this is fundamentally unfair.

Actual indicia of unfairness includes the Chair repeatedly emphasizing the need to accelerate the hearing, insisting on the trial of 45 separate factual allegations in just 8 days (A 117, 120, 716). He became increasingly agitated about the pace of the proceedings (A 102, 112) timing Petitioner and announcing the minutes elapsing

between questions and threatening to excuse the witnesses if questions were not immediately propounded (A 116, 119, 260)[6] Two commissioners and the Prosecutor joined in the agitation over the pace of the proceedings (A 106, 123, 121, 109).

Petitioner was forced to trial 9½ to 10 hours a day; on one day allowed only a 20-minute lunch break. The Chair ignored his objections based on exhaustion, excusing his witnesses when he could no longer continue. (A 107-108, 110)[7]

Commissioners, as the jury, became restless and inattentive. They laughed, talked, audibly yawned, and slept through the trial. One caught reading a pocket calendar refused to stop when challenged, responding instead by glaring at Petitioner during the remainder of his presentation. Two Commissioners read newspapers during the trial. (See Issue Five, *infra* at page 28). One commissioner exclaimed "Jesus Christ" with respect to Petitioner's efforts during the trial.[8] A photograph of one reading his newspa-

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[6]For a full picture of the obsession with accelerating the trial, the Court's attention is directed to Document 5 (A 97, *et seq.*).

[7]For a full picture of the effects of the gruelling trial schedule, the Court's attention is directed to Document 7 (A 173, *et seq.*).

[8]For these and other examples of the JQC's conduct during the trial, the Court's attention is directed to Document 4 (A 71, *et seq.*).

per was published in the local newspaper. Petitioner filed affidavits from citizens viewing the trial which verified this conduct (A 180).

Less egregious conduct of the judge, jury, and prosecutor was enough in a federal drug case to justify reversal on due process grounds even where the defendant was given the benefit of a procedure where he did not face a unified judge, jury, investigator, and prosecutor. *U.S. v. McClain*, 823 F.2d 1457 (11th Cir. 1987).

Additionally, the Chair, an attorney at law, twice charged Petitioner with contempt in the presence of the juror commissioners (5 of which are lay persons) threatening him with incarceration; once for trying to clarify how Petitioner's assistant might be allowed to photograph sleeping commissioners and once for taking too long to make a note concerning the Chair's refusal to allow a proffer of a federal due process objection. (A 255-59, 260-62).

No less than 65 times Petitioner was not allowed to proffer legal objections or argument. Typically, the Chair would refuse to allow a proffer stating that it could be made at a later time. However, if Petitioner took a few minutes to note the objection so it could be proffered at a later time, he was then charged with contempt and threatened with jail (A 260-261). Subsequently, the chair flatly refused Petitioner permission to make such notes (A

152)[9] At one point Petitioner was instructed to make his proffers to an empty courtroom. (A 730-738).

When Petitioner inadvertently left a critical name off the witness list, he was banned from calling the witness without the preliminary hearing required by Florida law.[10] When the Prosecutor made the same mistake, his witness was allowed. (A 1128)

At one point in the proceedings, General Counsel physically shoved Petitioner in full view of the Commissioners and public (A 708-709). Both trial and pre-trial motions were heard *ex parte* without notice and without hearing. (A 733) One motion was heard before Petitioner even received a copy (A 237-246).

Finally, the JQC refused to allow Petitioner to prove or argue affirmative defenses that the JQC, its proceedings, and the Code violated the United States Constitution with respect to selective prosecution, free speech, vagueness of the Code, or due process of the law. (A 740-743, 916.5, 760).

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[9]For a full picture of the extent to which Petitioner was denied his right to proffer, the Court's attention is directed to Document 6 (A 125, *et seq.*).

[10]The state of Florida requires a "*Richardson*" hearing under these circumstances. The Florida courts have held that it is per se reversible error not to hold such a hearing even when it is not requested. *Richardson v. State*, 246 So.2d 771 (Fla. 1971); *Fedd v. State*, 461 So.2d 1384 (Fla. 1st DCA 1984); *Hall v. State*, 477 So.2d 572 (Fla. 4th DCA 1985).

There is obviously much more going on in a judicial discipline case than in Dr. Larkins' case. There is not only the possibility that bias may exist, it is obvious. Accordingly, judges throughout the nation have raised, albeit unsuccessfully, the *Withrow* objection in their respective state supreme courts.[11]

Because they are the investigator and prosecutor, these commissions can selectively target a judge for impermissible reasons. Because they are the judge, they can select the evidence which will be admitted and excluded. Finally, because they are the jury, they select the result that supports their prosecution by the simple and not surprising conclusion that their witnesses are credible, but the judge's are not.

This type of proceeding affects judges and communities throughout the nation. It is accordingly a matter of great national importance which deserves a full review by this Honorable Court.

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[11] *In Re Elliston*, 789 S.W.2d 469 (Mo. 1990); *In the Matter of Del Rio*, 256 N.W.2d 727 (Mich. 1977); *In Re Rome*, 542 P.2d 676 (Kan. 1975); *In Re Hanson*, 532 P.2d 303 (Alaska 1975); *In Re Diener and Broccolino*, 304 A.2d 587 (Md. 1973), *cert. den.*, 415 U.S. 989; *In Re Kelly*, 238 So.2d 565 (Fla. 1970), *cert. den.*, 401 U.S. 962; *In the Matter of Mikesell*, 243 N.W.2d 86 (Mich. 1976); *In Re Haggerty*, 241 So.2d 469 (La. 1970).

ISSUE FIVE

WHETHER THE CONDUCT OF THE PROCEEDINGS IN THEIR TOTALITY RESULTED IN A FUNDAMENTALLY UNFAIR PROCEDURE THEREBY VIOLATING THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

Justice must satisfy the appearance of justice. *Offutt v. United States*, 348 US 11, 14 (1954).

In a democratic society the people's elected officials should not be disturbed in their tenure except in instances of great aggravation. *In Re Kelley*, 238 So.2d 565, 579 (Fla. 1970) (Justice Ervin in dissent.)

The commissioners acting as the jury appeared to be disinterested in the fact finding process. In full public view they laughed, talked, audibly yawned, and slept through the proceedings. One commissioner caught reading a pocket calendar refused to stop even when challenged, responding instead by laughing and glaring at the Petitioner during the remainder of his presentation. (See Issue Four, *supra*)

Two commissioners read newspapers during the proceedings. A photograph of one of the commissioners reading his newspaper was published locally. One commissioner exclaimed "Jesus Christ"

with respect to the Petitioner's efforts during the proceedings. (See Issue Four, *supra*)[35]

The following photographs reflect the publicly televised appearance of the JQC during the hearing which ultimately resulted in the extreme sanction of the removal of an elected public official.

Approximately 30,000 to 40,000 citizens of Citrus County viewed these proceedings on local cable television (A 620).[36]

Videocapture of Exhibit 175
Titled "JQC, Sleeping, etc."
Petitioner's Reply to Commission's Reply

[35]For a complete understanding of the commission's conduct during the proceedings, the Court's attention is directed to Document 4 of the Appendix (A 71 *et seq.*).

[36]See letters from the public demonstrating the public reaction (A 884).

Exhibit 187
Petitioner's Reply to Commission's Reply

Videocapture of Exhibit 175
Titled "JQC, Sleeping, etc."
Petitioner's Reply to Commission's Reply

In addition to this conduct, the JQC thwarted the Petitioner's discovery, suppressed his evidence, persistently ruled on motions ex parte without notice or hearing, refused to follow fundamental rules of evidence and procedure, and refused to allow him to prove or argue that he had been selectively prosecuted by a biased commission as measured against a vague code for the impermissible reason that Petitioner had upset the local legal community and newspapers by being a highly independent reform-minded judge (See Issues One through Four, *supra*).

These proceedings directed to the grave concern of removing a twice-elected public official did not satisfy justice because they failed to satisfy the appearance of justice. If the decision of a commission which openly talked, laughed, slept, and read calendars during such unfair televised proceedings is allowed to stand, it will deal a crushing blow to the appearance of the integrity of the judicial system which far exceeds any harm the Petitioner is alleged to have caused.

It is accordingly a matter of great national importance which deserves a full review by this Honorable Court.

Respectfully,
Michael L. Kinney
Counsel for Petitioner